

26

STATE OF MICHIGAN
IN THE SUPREME COURT
ON APPEAL FROM THE COURT OF APPEALS
Fitzgerald, P.J., and Bandstra and Gage, J.J.

In the Matter of C.A.W., Minor.

FAMILY INDEPENDENCE AGENCY,

Supreme Court No. 122790

Petitioner-Appellant,

Court of Appeals No. 235731

v

Macomb Circuit Court No. 92-36958-NA

LARRY HEIER,

Appellee,

and

DEBORAH ANN WEBER AND ROBERT
RIVARD,

Respondents.

_____/

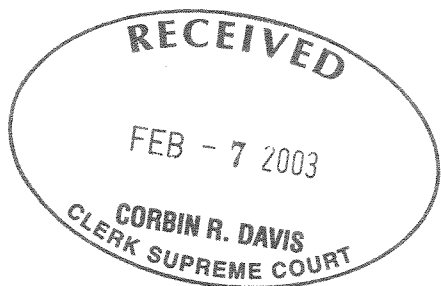
BRIEF ON APPEAL - PETITIONER-APPELLANT

ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

	<u>Page</u>
INDEX OF AUTHORITIES.....	iii
QUESTION PRESENTED FOR REVIEW.....	vii
STATEMENT OF PROCEEDINGS AND FACTS	1
ARGUMENT	13
I. Heier does not have standing to intervene in the Juvenile Code child protective proceeding because C.A.W. already has a legal father.	13
A. Standard of Review	13
B. Summary of Argument.....	13
C. Standing is a fundamental requirement to enter the courts. A court’s neglect of this requirement imperils the constitutional doctrine of separation of powers.	14
D. The Court of Appeals determination that Heier, a putative biological father, has standing to intervene in the Macomb County Circuit Court child protective proceeding where the child already has a legal father is contrary to law interpreted by this Court in <i>Girard v Wagenmaker</i> , 437 Mich 231; 470 NW2d 372 (1991).	18
1. Neither the Juvenile Code, MCL 712A.1 <i>et seq</i> , nor the Michigan Court Rules pertaining to child protective proceedings allow a putative biological father to intervene in a child protective proceeding where there is already a legal father.	23
2. The Court of Appeals erred in concluding that C.A.W. was a “child born out of wedlock.”.....	27
3. The Court of Appeals erred in concluding that the circuit court could have determined the identity of the putative biological father.	29
4. The case law relied upon by the Court of Appeals to support its decision that a putative biological father has standing to intervene in a child protective proceeding is not applicable to this case.	32
5. The Court of Appeals’ attempt to analogize a child protective proceeding to one under the Adoption Code, MCL 710.21 <i>et seq.</i> , and confer standing on a putative biological father in a child protective proceeding where there is already a legal father is wrong as a matter of law.	35
6. The Court of Appeals erred in concluding that the circuit court should have allowed Heier to establish paternity after Rivard’s parental rights were terminated.	37

7.	The Court of Appeals erred in concluding that Heier was entitled to notice.	39
8.	The standing requirement enunciated by this Court does not deprive Heier of a recognized liberty interest without due process of law.	40
9.	Michigan law governing intervention mandates that Heier's motion to intervene be denied.	40
E.	Public policy does not allow the judiciary to confer standing on a putative biological father to intervene in a Juvenile Code child protective proceeding where the subject child already has a legal father.	42
1.	Standard of Review	42
2.	The Court of Appeals opinion violates the fundamental principle of the presumption of legitimacy and the sanctity of family.	42
3.	The Court of Appeals opinion nullifies the equitable parent doctrine.	44
4.	The Court of Appeals opinion ignores the state and federal policy concerns regarding placement of children in safe and permanent homes.	46
CONCLUSION AND RELIEF		47

INDEX OF AUTHORITIES

	<u>Page</u>
 Cases	
<i>Atkinson v Atkinson</i> , 160 Mich App 601; 408 NW2d 516 (1987), <i>lv den</i> 429 Mich 883; 429 Mich 884 (1987)	44
<i>Crego v Coleman</i> , 463 Mich 248; 615 NW2d 218 (2000)	25
<i>Dale v Beta-C, Inc.</i> , 227 Mich App 57; 574 NW2d 697 (1997), <i>lv den</i> 459 Mich 877; 585 NW2d 302 (1998)	29
<i>Eldred v Ziny</i> , 246 Mich App 142; 631 NW2d 748 (2001)	25
<i>Family Independence Agency v Deborah Ann Weber</i> , unpublished opinion per curiam of the Court of Appeals, decided October 26, 2001 (Docket No. 232206)	34
<i>Girard v Wagenmaker</i> , 437 Mich 231; 470 NW2d 372 (1991)	passim
<i>In re Johanson</i> , 156 Mich App 608; 402 NW2d 13 (1986)	41
<i>In re Kozak</i> , 92 Mich App 579; 285 NW2d 378 (1979)	32, 33, 34
<i>In re Kurzyniec</i> , 207 Mich App 531, 543; 526 NW2d 191 (1994)	42
<i>In re Montgomery</i> , 185 Mich App 341; 460 NW2d 610 (1990)	34, 35
<i>In re Neagos</i> , 176 Mich App 406; 439 NW2d 357 (1989)	33
<i>In re NEGP</i> , 245 Mich App 126; 626 NW2d 921 (2001)	39
<i>In re TMK</i> , 242 Mich App 302; 617 NW2d 925 (2000)	36

<i>In the Matter of SG, TG, DG and QR, Minors,</i> unpublished opinion per curiam of the Court of Appeals decided March 6, 2001 (Docket no. 227520).....	21
<i>Karrip v Township of Cannon,</i> 115 Mich App 726; 321 NW2d 690 (1982).....	41
<i>Kirby v Larson,</i> 400 Mich 585; 256 NW2d 400 (1977).....	25, 29, 31
<i>Lee v Macomb Co Bd of Comm'rs,</i> 464 Mich 726; 629 NW2d 900 (2001).....	13, 14, 17, 18
<i>McCready v Hoffius,</i> 459 Mich 131; 586 NW2d 723 (1998).....	42
<i>McDougall v Schanz,</i> 461 Mich 15; 597 NW2d 148 (1999).....	25, 29
<i>McHone v Sosnowski,</i> 239 Mich App 674; 609 NW2d 844 (2000).....	20, 21, 32, 34
<i>Michael H. v Gerald D.,</i> 491 US 110, 124; 10 S Ct 2333; 105 L Ed 2d 91 (1989).....	passim
<i>O'Donnell v State Farm Mut Automobile Ins Co,</i> 404 Mich 524; 273 NW2d 829 (1979).....	42
<i>People v Glass,</i> 464 Mich 266; 627 NW2d 261 (2001).....	25
<i>People v Knox,</i> 115 Mich App 508; 321 NW2d 713 (1982).....	22
<i>People v Mitchell,</i> 428 Mich 364, 369-370; 408 NW2d 798 (1987).....	20
<i>People v Pitts,</i> 222 Mich App 260; 564 NW2d 93 (1997).....	40
<i>People v Stone,</i> 463 Mich 558; 621 NW2d 702 (2001).....	28
<i>Smith v Smith,</i> 433 Mich 606; 447 NW2d 715 (1989).....	25, 26, 36
<i>Speilmaker v Lee,</i> 205 Mich App 51; 517 NW2d 558 (1994).....	19

<i>St. George Greek Orthodox Church v Laupmanis Associates, P.C.</i> , 204 Mich App 278; 514 NW2d 516 (1994)	29
---	----

<i>Van v Zahorik</i> , 460 Mich 320; 597 NW2d 15 (1999)	38, 42, 44, 45
--	----------------

Statutes

1944 (1 st Ex Sess) PA 54	24
--	----

25 USC 1912	41
-------------------	----

MCL 35.21 <i>et seq</i>	14
-------------------------------	----

MCL 700.2114(a)	38
-----------------------	----

MCL 710.21 <i>et seq</i>	32, 35
--------------------------------	--------

MCL 710.36	35
------------------	----

MCL 710.37(1)(a)	37
------------------------	----

MCL 712A.1 <i>et seq</i>	13, 22, 23, 24
--------------------------------	----------------

MCL 722.1002	25
--------------------	----

MCL 722.1002(b)	25
-----------------------	----

MCL 722.1003	25
--------------------	----

MCL 722.1004	25
--------------------	----

MCL 722.21 <i>et seq</i>	19
--------------------------------	----

MCL 722.711 <i>et seq</i>	19
---------------------------------	----

MCL 722.711(a)	19, 22, 23, 27
----------------------	----------------

MCL 722.714(1)	23
----------------------	----

The Adoption and Safe Families Act of 1997, Pub L 105-89; 111 Stat 2115 <i>et seq</i>	46, 47
--	--------

Rules

MCR 5.901 <i>et seq</i>	24, 39
MCR 5.903.....	28
MCR 5.903(A)(1).....	22, 27
MCR 5.903(A)(4).....	29, 30, 31
MCR 5.903(A)(4)(a)	22, 30, 35
MCR 5.903(A)(7).....	24
MCR 5.921	4
MCR 5.921(B)(1).....	39
MCR 5.921(D)	29, 31, 32, 35
MCR 5.921(D)(4).....	22

QUESTION PRESENTED FOR REVIEW

- I. Whether a putative biological father has standing to intervene in a Juvenile Code child protective proceeding where the subject child already has a legal father.**

STATEMENT OF PROCEEDINGS AND FACTS

In July 1998, Child Protective Services (CPS) removed J.W., B.W., and C.A.W. from their biological mother, Deborah Weber, due to neglect and allegations of abuse. (App 5a.)¹ The children were ages six, four, and the youngest, C.A.W., was 15 months old. This was not the first time that Deborah Weber had a child removed from her care nor was this her first contact with CPS. Deborah Weber first came to CPS's attention in 1987 when her daughter, Kimberly, was made a temporary court ward. (Tr Permanent Custody Hearing, 5/18/00, p. 8.)² Weber was a drug addict and could not care for Kimberly. Kimberly was removed from her mother's care once in Wayne County and twice in Macomb County. (*Id.*, p. 29.)

CPS had contact with Weber since 1995 regarding issues of domestic violence and neglect. (*Id.*, p. 20; App 7a.) CPS opened another file on Weber in May of 1998 after being notified by the police that a fire had occurred in her home on April 29, 1998, and there were concerns about the care and supervision of her children. (Tr Permanent Custody Hearing, 5/18/00, p. 7.) The fire completely destroyed the home. The St. Clair Shores Police and Fire Department responded to the fire and observed burn injuries to C.A.W. that they believed were related to the house fire. (*Id.*, p. 14.) The burns covered his torso and arm, and were red with blisters. (*Id.*, p. 14, Tr Permanent Custody Hearing, 6/26/00, p. 61.) C.A.W. was transported to St. John Hospital because the burns needed immediate attention. C.A.W. was in extreme pain from the burns. (R Permanent Custody Hearing, 9/18/00, p. 40.) Weber claimed that the burns had occurred the day before the house fire from an accident involving hot soup. (Tr Permanent

¹References to all exhibits in the Appendix (App) are part of the circuit court and Court of Appeals record below unless otherwise indicated.

²References to certified transcripts (Tr) and record (R).

Custody Hearing, 5/8/00, p. 15.) Weber did not seek immediate medical treatment for C.A.W. because her husband, Robert Rivard, had just started a new job and she did not want to call him away from his employment. (Tr Permanent Custody Hearing, 9/18/00, pp. 57-58.) She testified that there was no one else she could contact to help her so that C.A.W. could obtain medical treatment. (Tr Permanent Custody Hearing, 9/18/00, p. 27.)

After the April 29th fire, Weber and the three children were homeless. (*Id.*, p. 7.) A Families First intervention, a program within the Family Independence Agency to help troubled families, was initiated to assist Weber in locating housing and developing appropriate child rearing skills. (*Id.*, p. 33.) Weber and the three children were in temporary housing with various individuals, staying with a babysitter, friends, and in a motel for a short period of time. (*Id.*, p. 7., Tr Permanent Custody Hearing, 9/18/00, p. 42.) Families First was concerned because Weber left her children with a babysitter who was an alcoholic and Families First had seen the sitter drunk while caring for the three children. (Tr Permanent Custody Hearing, 5/8/00, pp. 35-36.) Weber eventually ended up living in a trailer in Warren with her three children, her husband, Rivard, a man called "Mack" who owned the trailer, and a woman named Kathy who resided at the trailer with Mack. On July 25, 1998, a second fire occurred at a home where Weber resided. (Tr Permanent Custody Hearing, 9/18/00, p. 7.) Weber was alleged to have started the fire either with a lit cigarette or by smoking heroin. (App 8a.) Weber claimed Kathy, the other woman who resided in the trailer, started the fire. (App 8a, Tr Permanent Custody Hearing, 5/8/00, p. 7.)

The police and fire department were called to the trailer and Weber was transported to the hospital due to possible smoke inhalation. The police released the children to their older sister, Kimberly, who was seventeen. The police contacted CPS. (App 8a.)

After the fire, Mack did not want Weber and the children to return to the trailer. Weber and the children were again homeless. (Tr Permanent Custody Hearing, p. 9.) Weber and the

children's whereabouts were unknown to CPS but CPS worker Marcy Fincher had Kimberly's address. (*Id.*, p. 10.) On July 30, 1998, Kimberly advised Fincher that Weber had started new employment at Pete and Frank's Fruit and Vegetable Market in Eastpointe. (*Id.*) Fincher went to Pete and Frank's and Weber stated that the children were fine. (*Id.*) Fincher advised Weber that she would not leave until she saw the children. Weber still did not have a home for herself and the children. (*Id.*) She took Fincher to a public park in Eastpointe where a babysitter watched the children. (*Id.*, pp. 10-11.)

Fincher called the police and took the children into custody pursuant to orders she had already obtained from the circuit court. (*Id.*, p. 11.) Fincher had reviewed the prior CPS file and specifically looked at the burns on C.A.W. to see if the injuries were healing. She was concerned that C.A.W. may not be receiving consistent medical care for the burns due to the instability of Weber's living situation. (*Id.*, p. 16.) Fincher's concerns were well founded because C.A.W.'s burns needed immediate medical attention. (Tr Permanent Custody Hearing, 5/8/00, p. 17.)

The children were placed in foster care on July 30, 1998. At the time the children were taken into custody all three had head lice. One child had a head injury that was not healing well and for which he had not received appropriate medical care. (Tr Permanent Custody Hearing, pp. 16-17 and App 7a.)

As noted above, C.A.W. had severe burns to his torso and arm. C.A.W. needed to be placed in a separate foster home from his brothers due to the third degree burns that occurred on April 29, 1998.³ C.A.W.'s foster parents, John and Denise Vanscoy, took him to Children's Hospital for burn treatment with Dr. Cullin, the head of the Burn Unit at Children's Hospital. *Id.*

³ Medical Records from circuit court file.

Dr. Cullin advised the foster parents that the burns were third degree burns that could not have been caused by hot soup.⁴ *Id.* The foster parents scheduled ongoing medical appointments for C.A.W.'s severe burns and disfigurement because C.A.W. needed on-going treatment and reconstructive surgeries. (Tr Permanent Custody Hearing, 5/8/00, pp. 93-95.) C.A.W. had scheduled medical visits with Dr. Cullin at least once a month. C.A.W. was required on a daily basis to wear a rubber suit, called a Jobst suit, to keep his skin soft and supple and compressed against his body in an effort to repair the burn damage. (*Id.*)

A petition for temporary custody was filed with the Family Division of the Macomb County Circuit Court, and a preliminary hearing was held on July 31, 1998. (App 1a.) The initial petition indicated that Rivard was the father of two of the children and legal father of all three children and that Larry Heier was a possible biological father of C.A.W. (App 8a.) Heier's address was unknown. The court ordered that Heier be served by publication and the parties were directed to return to court on August 19, 1998 at 9:30 a.m. On July 31, 1998, the court sent notice of the proceedings to the Macomb County Legal News for publication. The circuit court ordered the published notice to state that Heier was to appear before the court on August 19, 1998.⁵

⁴ The older brother, J.W., stated that the burns occurred while Deborah Weber was changing C.A.W.'s diaper next to a stove. The stove caught C.A.W.'s clothes on fire resulting in the severe third degree burns.

⁵ The notice sent by the circuit court states that a hearing was to be held on August 19, 1998. The Macomb County Legal News made a clerical mistake and used the date of August 9, 1998. This harmless clerical mistake is not crucial since Heier is not a person entitled to notice in a child protective proceeding. *See*, MCR 5.921. Additionally, the notice was published on **August 14, 1998**, prior to the August 19, 1998 hearing date. The notice was sufficient to let him know about the matter before the circuit court.

At the hearing on August 19, 1998, it was determined that the children should remain in foster care pending adjudication on the petition for temporary custody. The parties returned to court on September 3, 1998, at which time testimony was taken from Weber who testified that Heier was not the father of C.A.W. and Rivard testified that he was the biological father of C.A.W. Testimony was also presented that Rivard and Weber were married on May 19, 1989 in Toledo, Ohio, and had not divorced. A marriage certificate was made part of the record. (App 10a.)

Based on the testimony presented on September 3rd, the petition was amended by the circuit court to identify Rivard as the legal father of the minors, B.W., J.W., and C.A.W. Heier's name was removed from the petition. (App 11a.) The amendment to the petition states in paragraph 19:

Robert Rivard is the legal father of all three children. Mr. Rivard may not be the biological father for any of or all the children. Mr. Rivard and Ms. Weber were married in 1989 and have not yet been divorced. Ms. Weber has admitted to having other relationships with men during her marriage to Mr. Rivard.

On September 3, 1998, sworn testimony was taken and the matter was adjudicated by the circuit court. Both Rivard and Weber pled no contest to the amended petition that identified Rivard as the legal father to C.A.W. (App 11a.)

In all subsequent court orders, Rivard is clearly identified as the legal and/or natural father of C.A.W. Rivard at all times considered himself to be the legal and natural father of C.A.W. Rivard attended almost every court hearing during the two and a half years the children were in foster care and advised the circuit court that he is the natural father of all three children. The circuit court actively pursued child support actions against both Deborah Weber and Robert Rivard. (R Orders for Reimbursement; see, for example, App 12a-13a.)

On December 30, 1999, Appellant Michigan Family Independence Agency (FIA) filed a petition for permanent custody requesting termination of Weber and Rivard's parental rights. (App 14a-15a.) On November 13, 2000, almost two and one half years after C.A.W. was initially placed in foster care (July 30, 1998), the circuit court terminated Rivard and Weber's parental rights over C.A.W. and his siblings. (App 16a.) The permanent custody trial took place over a span of six months. At every hearing date for the permanent custody trial, Rivard identified himself as both the natural and legal father of C.A.W. At the permanent custody trial, Weber testified that Robert Rivard was the natural father of C.A.W. Weber and Rivard were married at the time all three children were conceived and born. (App 10a.)

The permanent custody hearing was held on May 8, 2000, June 26, 2000, July 31, 2000, August 17, 2000, September 18, 2000, and November 13, 2000. The evidence at the permanent custody hearing established Weber's long history of substance abuse and child neglect dating back to 1987. Weber tested positive for drugs at least once while the children were in foster care, and one of Weber's children was born drug addicted. The court heard testimony that on at least two occasions Weber and the three children were homeless. The court heard testimony about Weber's history of domestic violence and her pattern of getting involved with violent men. The court heard testimony that all visits between Weber and the children occurred at an FIA or a therapist's office and those visits did not go well. (Tr Permanent Custody Hearing, 5/18/00, pp. 57, 64.)

The circuit court rendered its opinion and order terminating parental rights on November 13, 2000 noting the long history of substance abuse by Weber, her history of involvement with violent men, and her inability to parent and properly care for the children. The circuit court established that Rivard was the father of all three children by virtue of his marriage with Weber and also identified Rivard as the natural father based on the testimony presented at the permanent

custody hearing. (Tr Permanent Custody Hearing, 11/13/00, pp. 10, 13.) With respect to C.A.W., the circuit court recognized his special medical needs stating:

I would say, I have had the opportunity to view the photographs⁶ which were previously admitted at another hearing in this matter and I would note for the record that the burns are very severe, very permanent in nature, requiring continuing extensive reconstructive surgery.

(*Id.*, p. 20.)

On November 13, 2000, the circuit court terminated parental rights of both Weber and Rivard and committed the children to the Michigan Children's Institute for custody, care, supervision, and adoption planning. (App 16a-17a.) C.A.W. had been in foster care with the same foster family since the age of 15 months. He was almost 4 years of age⁷ at the time parental rights were terminated. The only father figure who was a permanent fixture for C.A.W. over these two and one half years was his foster father, John Vanscoy. (App 18a-19a.)

Approximately two months later, on or about January 29, 2001, Heier, claiming to be the biological father of C.A.W., filed a motion to intervene in the child protective proceedings. (App 1a.) However, by this time, the parental rights of Weber and Rivard had been terminated and the child protective proceedings had been concluded. There was no longer an action pending that Heier could intervene in. On November 13, 2000, the court committed the children to the Michigan Children's Institute (MCI) for custody, care, supervision, and adoption planning. C.A.W. was now an MCI ward and in a preadoptive home. (App 16a-17a.)

The circuit court held three separate hearings on Heier's motion to intervene. (Tr Motion to Intervene, 2/8/01, 3/26/01, 4/26/01.) Both FIA and C.A.W.'s attorney, Jacqueline Nanni, objected to the motion, arguing that Heier lacked standing to bring the motion. (App 22a-38a.)

⁶ The pictures submitted into evidence do reveal the severity of the burns to C.A.W.

⁷ C.A.W. will be six years old on February 17, 2003.

FIA also argued that because C.A.W. was committed to the Michigan Children's Institute for custody, care, supervision and adoption planning, the court no longer had jurisdiction to consider the motion to intervene because the commitment was irrevocable and the court was divested of jurisdiction over the child. (App 22a-26a.)

Heier admitted to the circuit court that he knew about the child protective proceedings but did not get involved because he wanted all three children returned to Weber. Heier claimed that early on he visited and supported C.A.W. while he was in foster care. However, this claim is not credible because visitation was held at FIA offices, not at the foster family's home. (See, e.g., App 39a-40a and Tr Permanent Custody Hearing, 5/18/00, pp. 57, 64.) Moreover, all interested parties, i.e., the circuit court, foster parents, prosecutor, agency, and children's attorney knew nothing about Heier's alleged contact with C.A.W. and the alleged support. (App 18a-38a.) In fact, the circuit court was actively pursuing support payments from Rivard since he was adjudged the natural and legal father of all three children. (App 12a-13a.) Weber further testified that she obtained adequate support for the children from Rivard and, if divorced, she would seek a support order against him for all three children. (Tr Permanent Custody Hearing, 9/18/00, pp. 12, 61-62.)

Significantly, at the permanent custody hearing on September 18, 2000, Weber clearly identified Rivard as C.A.W.'s father at p. 21:

Q Was Mr. Rivard the natural father of [C.A.W.]?

A Yes.

Weber steadfastly identified Rivard as C.A.W.'s father and did not waver on this issue during her testimony.⁸

At the permanent custody hearing, a man named "Larry" is referenced as a boyfriend who had incidental contact in the manner of "playing" with all three children while dating Deborah Weber.⁹ Also a man named "Larry" is referenced in the context of a person who was physically abusive toward Deborah Weber. The record reveals that any contact "Larry" had with all three children resulted from his dates with Weber, not from planned or scheduled visits with any of the children.

In addition, the record shows that Heier could not have been involved in any meaningful way with C.A.W. By 15 months of age, C.A.W. had survived two house fires and was involved in a third incident that resulted in him sustaining severe, disfiguring third degree burns. Since C.A.W. was still in diapers at 15 months, a person having any meaningful contact with him or providing any meaningful care for him would have noticed the third degree burns to his arm and torso. On at least two occasions, C.A.W. was homeless living in motels, with an alcoholic

⁸ This is important because at p. 2 of its opinion (App 45a), the Court of Appeals either misinterprets the testimony provided at the permanent custody hearing or did not read it in context with all the testimony and the records that are part of the circuit court file. At the hearing, Deborah Weber was asked who was C.A.W.'s father. She clearly identified Robert Rivard as C.A.W.'s father. Later in her testimony when she was asked who the children "believed" was their father, she responded "Mr. Rivard, except for [C.A.W.]" (Tr Permanent Custody Hearing, 9/18/00, p. 52.) The Court of Appeals seems to suggest that this means she was changing her testimony about who was the father of C.A.W. However, it clearly does not. If the Court of Appeals had looked at the record as a whole, as did the circuit court, it is clear that C.A.W. was so young when taken into care, he most likely did not know who his father was. The only male figure in his young life that acted as a father figure, cared for, and loved him was his foster father, John Vanscoy. He had no other consistent, supportive, custodial relationship with any other male. Thus, it is not surprising that he would not think of Rivard as his father and the statement clearly does not mean he viewed Heier as his father, a person who had no meaningful involvement in C.A.W.'s young life.

⁹ The majority correctly noted in its opinion that nothing in the record establishes this reference is to Larry Heier. Deborah Weber admittedly had several relationships with various men over the years.

babysitter, and with various other people. Because C.A.W.'s mother did not have a home, a babysitter watched all three children at a public park while Weber worked.

Additionally, the record shows that Weber only looked to Rivard to provide support for her and the three children, not "Larry." In fact, Heier was obviously not a person Weber looked to for any kind of support for C.A.W. because she clearly testified that there was no one she could call to assist her to obtain medical care for C.A.W. after he sustained the severe, disfiguring burns in April 1998. (Tr Permanent Custody Hearing, 9/18/00, p. 27.) There is no credible evidence that "Larry" provided any financial or emotional support to C.A.W.

During the two and one half years that C.A.W. was in foster care, he had complex medical needs due to the severe burns, required constant medical care, wore a special body suit, and continued to have reconstructive surgery. C.A.W.'s burn injuries will require reconstructive surgery into adulthood. From April 28, 1998 until July 30, 1998 when C.A.W. was placed into foster care, no meaningful action was taken to secure adequate medical care for his severe burns.

After C.A.W. was placed in foster care, there is nothing in the record to show that Heier took C.A.W. to any medical appointment, expressed any concern about the child's special medical needs, visited him, or went to the hospital during C.A.W.'s reconstructive surgeries. Most importantly, although Heier knew of the circuit court proceedings during this entire time period, he made no effort to participate in any court proceeding because he purportedly wanted C.A.W. to be returned to Deborah Weber for care. (Tr Motion to Intervene, 2/8/01, p. 12.)

On April 26, 2001, the circuit court ruled that Heier did not have standing to bring his motion because C.A.W. already had a legal father. (App 41a.) The circuit court denied his request to intervene and establish paternity to C.A.W. The circuit court declined to address the

issue of jurisdiction and entered a written order on April 26, 2001¹⁰ denying Heier's motion to intervene stating "Mr. Larry Heier's motion to intervene on behalf of [C.A.W.] is denied for the reason that Mr. Larry Heier lacks standing to bring this motion before this Court." *Id.*

On May 14, 2001, Heier filed a claim of appeal with the Court of Appeals. On June 13, 2001, the Court of Appeals dismissed the claim of appeal because it lacked jurisdiction to consider the claim. (App 42a.) On or about July 27, 2001, Heier filed a delayed application for leave to appeal seeking reversal of the circuit court's April 26, 2001 order. FIA filed its response to the delayed application for leave to appeal and asked that the delayed application be denied. On September 12, 2001, the Court of Appeals issued an order granting the delayed application for leave to appeal, limited to the issues raised in the application. (App 43a.)

Oral argument was held on September 5, 2002 followed by the Court of Appeals rendering a published decision dated November 1, 2002. **The majority correctly stated that its decision in this case regarding standing in the context of a child protective proceeding "will have a great affect on the family courts throughout the state."** (App 46a.) In that published decision, the Court of Appeals majority opinion states that Heier had standing to intervene in the child protective proceedings even though there was already a legal father and the circuit court child protective proceedings had concluded. (App 44a-51a.) The majority held that the circuit court should have searched for a putative father even though a legal father (Rivard) existed. *Id.* The majority also held that after the legal father's parental rights were terminated, the circuit court should have allowed the putative biological father, Heier, to intervene and establish paternity to C.A.W. The majority found that Heier was entitled to notice of the child protective

¹⁰ According to the circuit court docket entry sheet, the order denying motion to intervene was actually entered on April 26, 2001. (App 1a.) The Court of Appeals determined in a prior order it was entered May 1, 2001. (App 42a.)

proceedings. *Id.* The Court of Appeals reversed the circuit court decision and remanded the case back to the circuit court ordering that Heier be allowed to establish paternity to C.A.W. *Id.*

In a dissenting opinion, Judge Fitzgerald stated the majority opinion conflicted with established law in Michigan that putative biological fathers do not have standing to intervene in a child protective proceeding where there is already a legal father. (App 52a-54a.) Judge Fitzgerald sympathized with the majority but properly concluded that the Court's role was to apply the existing law until changed by the Legislature. *Id.* Judge Fitzgerald also found that the record did not support there was any meaningful contact between Heier and C.A.W., and that notice was not a real issue because Heier did not have standing. (App 54a-55a.)

FIA filed an application for leave to appeal to this Court because the Court of Appeals published decision is of significant public interest and the case is one involving the state of Michigan. The case also involves legal principles of major significance to the state's jurisprudence. Additionally, the Court of Appeals decision is clearly erroneous and will cause material injustice to all parties in this particular case and to the children and families involved in child protective proceedings in general. Finally, the Court of Appeals published decision conflicts with this Court's decisions as well as other published and unpublished decisions of the Court of Appeals.

On December 26, 2002, this Court granted FIA's application for leave to appeal from the Court of Appeals published November 1, 2002 decision. (App 56a.) This Court limited the appeal to the issue of "whether a putative biological father has standing to intervene in a Juvenile Code child protective proceeding where the subject child already has a legal father." (App 56a.) FIA now files its brief on appeal and asks this Court to reverse the Court of Appeals November 1, 2002 published opinion and affirm the circuit court's April 26, 2001 order denying Heier's motion to intervene for lack of standing.

ARGUMENT

I. Heier does not have standing to intervene in the Juvenile Code child protective proceeding because C.A.W. already has a legal father.

A. Standard of Review

In determining standing, this Court has reviewed the attempts of putative biological fathers trying to establish paternity of a child where there is a husband who is the presumptive legal father. *Girard v Wagenmaker*, 437 Mich 231; 470 NW2d 372 (1991). Standing is a legal issue reviewed *de novo*. *Lee v Macomb Co Bd of Comm'rs*, 464 Mich 726, 734; 629 NW2d 900 (2001).

B. Summary of Argument

Heier does not have standing to intervene in the Juvenile Code child protective proceedings because C.A.W. already has a legal father. The Court of Appeals opinion that Heier has standing to intervene is erroneous because it is contrary to law, as interpreted by this Court in *Girard v Wagenmaker, supra*. Moreover, neither the Juvenile Code, MCL 712A.1 *et seq.*, nor the Michigan court rules pertaining to child protective proceedings allow a putative father to intervene in a child protective proceeding where there is already a legal father. Because C.A.W.'s mother and legal father were married at the time of conception and birth and there was no prior judicial determination that he was a "child born out of wedlock," the Court of Appeals erred when it found that C.A.W. was a "child born out of wedlock."

The case law relied upon by the Court is not applicable to this case, and its conclusion that the circuit court could have determined the identity of the biological father is wrong as a matter of law. The Court's attempt to analogize a child protective proceeding to an adoption proceeding is in error. The Court's new legal theory allowing a putative father to intervene after parental rights are terminated is legally incorrect. It is not the judiciary's place to create new law

but should be left to the Legislature. Finally, public policy does not allow the judiciary to confer standing on a putative biological father to intervene in a child protective proceeding where the child already has a legal father.

C. Standing is a fundamental requirement to enter the courts. A court's neglect of this requirement imperils the constitutional doctrine of separation of powers.

The issue of standing was thoroughly and thoughtfully addressed by this Court in *Lee v Macomb Co Bd of Comm'rs, supra*. In *Lee*, plaintiffs in Wayne and Macomb counties attempted to pursue actions to compel their respective county board of commissioners to levy a tax to establish a veterans' relief fund in accordance with the Veterans' Relief Fund Act, MCL 35.21 *et seq.* None of the plaintiffs actually sought relief under the Act. In Macomb County, the case was dismissed because the circuit court found that plaintiffs were not injured and therefore without standing to sue. The Wayne County Circuit Court found that the plaintiffs had standing to sue. Both cases were appealed to the Court of Appeals. The Court of Appeals consolidated the cases and found that plaintiffs had standing to sue. Defendants appealed to this Court. This Court reversed the Court of Appeals concluding the plaintiffs did not have standing to pursue the action in the circuit court.

In reviewing the appeal, this Court recognized at p. 735 that “in Michigan, as in the federal system, standing is of great consequence so that neglect of it would imperil the constitutional architecture whereby governmental powers are divided between the three branches of government.” In *Lee*, at pp. 735-737, this Court began its analysis of the standing requirement by reviewing the requirements of the federal judicial system:

It is important, initially, to recognize that in Michigan, as in the federal system, standing is of great consequence so that neglect of it would imperil the constitutional architecture whereby governmental powers are divided between the three branches of government.

Standing, as a requirement to enter the courts, is a venerable doctrine in the federal system that derives from US Const, art III, § 1, which confers only "judicial power" on the courts and from US Const, art III, § 2's limitation of the judicial power to "Cases" and "Controversies." In several recent cases, the United States Supreme Court has discussed the close relationship between standing and separation of powers. In *Lewis v Casey*, 518 US 343, 349; 116 S Ct 2174; 135 L Ed 2d 606 (1996), Justice Scalia, writing for the majority, said:

[T]he doctrine of standing [is] a constitutional principle that prevents courts of law from undertaking tasks assigned to the political branches. It is the role of courts to provide relief to claimants, in individual or class actions, who have suffered, or will imminently suffer, actual harm; it is not the role of courts, but that of the political branches, to shape the institutions of government in such fashion as to comply with the laws and the Constitution. [Citations omitted.]

Lewis was foreshadowed in *Lujan v Defenders of Wildlife*, 504 US 555, 559-560; 112 S Ct 2130; 119 L Ed 2d 351 (1992), where Justice Scalia, again speaking for the Court, explained:

[T]he Constitution's central mechanism of separation of powers depends largely upon common understanding of what activities are appropriate to legislatures, to executives, and to courts. . . . One of those landmarks, setting apart the "Cases" and "Controversies" that are of the justiciable sort referred to in Article III--"serv[ing] to identify those disputes which are appropriately resolved through the judicial process,"--is the doctrine of standing. Though some of its elements express merely prudential considerations that are part of judicial self-government, the core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III. [Citations omitted.]

In *Plaut v Spendthrift Farm, Inc*, 514 US 211, 219-225; 115 S Ct 1447; 131 L Ed 2d 328 (1995), Justice Scalia, in another majority opinion, provided a detailed analysis of the concern with preserving the separation of powers between the legislative and judicial branches, that traced its history back to the framers of the U.S. Constitution.

Finally, Chief Justice Rehnquist even more dramatically stated the case in his majority opinion in *Raines v Byrd*, 521 US 811, 818, 820; 117 S Ct 2312; 138 L Ed 2d 849 (1997):

“No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies.”

* * *

“[T]he law of Art III standing is built on a single basic idea--the idea of separation of powers.”

This Court at p. 737 continued its analysis of standing by comparing the federal doctrine of standing to Michigan standing requirements. This Court recognized that, in Michigan, standing has developed on a track parallel to the federal doctrine:

In Michigan, standing has developed on a track parallel to the federal doctrine, albeit by way of an additional constitutional underpinning. In addition to Const 1963, art 6, § 1 which vests the state "judicial power" in the courts, Const 1963, art 3, § 2 expressly directs that the powers of the legislature, the executive, and the judiciary be separate.¹¹ Concern with maintaining the separation of powers, as in the federal courts, has caused this Court over the years to be vigilant in preventing the judiciary from usurping the powers of the political branches. Early on, the great constitutional scholar Justice THOMAS M. COOLEY discussed the concept of separation of powers in the context of declining to issue a mandamus against the Governor in *Sutherland v Governor*, 29 Mich 320, 324 (1874):

Our government is one whose powers have been carefully apportioned between three distinct departments, which emanate alike from the people, have their powers alike limited and defined by the constitution, are of equal dignity, and within their respective spheres of action equally independent. One makes the laws, another applies the laws in contested cases, while the third must see that the laws are executed. This division is accepted as a necessity in all free governments, and the very apportionment of power to one department is understood to be a prohibition of its exercise by either of the others. The executive is forbidden to

¹¹ The powers of government are divided into three branches: legislative, executive and judicial. No person exercising the powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution. (Footnote in original.)

exercise judicial power by the same implication which forbids the courts to take upon themselves his duties.

This Court discussed the fact it had addressed the issue of standing prior to *Lee* but a majority could not agree on the criteria to establish standing. However, after the thorough analysis discussed above, this Court concluded:

Perhaps the clearest template was set forward by Justice CAVANAGH who, along with Justice BOYLE, advocated adopting the United States Supreme Court's *Lujan* test. *Lujan* held:

Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "injury in fact"--**an invasion of a legally protected interest** which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of--the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

The party invoking . . . jurisdiction bears the burden of establishing these elements. [504 US at 560-561 (citations omitted).]

In our view, the *Lujan* test has the virtues of articulating clear criteria and of establishing the burden of demonstrating these elements. Moreover, its three elements appear to us to be fundamental to standing; the United States Supreme Court described them as establishing the "irreducible constitutional minimum" of standing. We agree. [*Id.* at 739-740.]

(Emphasis added.) The Court stated "in the absence of standing, we will not address plaintiffs substantive claims." *Id.* at 741.

The principles enunciated by this Court in *Lee* mandate that the Court of Appeals decision in this case be reversed. Clearly, the Court of Appeals exceeded its judicial authority in concluding that Heier, a putative biological father, had standing to intervene in a child protective proceeding where there was already a legal father. The **legally protected interest** in danger of

being injured was vested in the legal father, Rivard, not the putative biological father.

Nevertheless, the Court of Appeals determined that Heier had substantive rights not recognized by the Legislature or any other appellate court. In reaching this conclusion, the Court of Appeals violated the constitutional doctrine of separation of powers and this Court's decision in *Lee* by judicially changing substantive law and allowing a putative biological father standing to intervene in a Juvenile Code child protective proceeding where there is already a legal father.

- D. **The Court of Appeals determination that Heier, a putative biological father, has standing to intervene in the Macomb County Circuit Court child protective proceeding where the child already has a legal father is contrary to law interpreted by this Court in *Girard v Wagenmaker*, 437 Mich 231; 470 NW2d 372 (1991).**

The Court of Appeals determined that Larry Heier, a putative biological father, had standing to intervene in the child protective proceedings after the parental rights of the mother and legal father were terminated and the child was committed to the Michigan Children's Institute for custody, care, supervision, and adoption. This opinion clearly contravenes this Court's decision in *Girard v Wagenmaker*, 437 Mich 231, 242-243; 470 NW2d 372 (1991), because a putative father does not have standing to assert any parental rights with respect to a minor child who has a legal father by virtue of a marriage between the mother and her husband who is deemed the presumptive legal father.

As noted above, in order to have standing, a party must have a legally protected interest that is in jeopardy of being adversely affected. *Lee, supra*. Heier did not have standing to intervene because he did not have a legally protected interest that was in jeopardy of being adversely affected. The legally protected interest was vested in Rivard.

In *Girard, supra*, this Court addressed the issue whether a putative biological father has standing to establish paternity over a child while the mother was legally married to another man without a prior determination that the mother's husband is not the father. In *Girard*, a putative

father (Girard) filed suit under the Paternity Act, MCL 722.711 *et seq*, and the Child Custody Act, MCL 722.21 *et seq*, claiming to be the father of a child conceived and born while the mother was married to her husband. Girard sought a determination of paternity and, if he was the biological father, an order of filiation, visitation, and support. The trial court found that Girard, a putative father, lacked standing to sue, but the appellate court reversed.

Girard appealed to the Michigan Supreme Court. This Court granted leave to determine whether a putative biological father can obtain standing under either the Paternity Act or the Child Custody Act to dispute the paternity of a child born while the natural mother is married to another man. To determine the issues before it, the Court reviewed the Paternity Act's definition of "child born out of wedlock" at MCL 722.711(a):

"Child born out of wedlock" means a child begotten and born to a woman who was not married from the conception to the date of birth of the child, or a child that the court has determined to be a child born or conceived during a marriage but not the issue of that marriage.

This Court also reviewed the legislative history of the Paternity Act and the public policy concerns of this state.

After reviewing the statute, legislative history, and discussing important issues of public policy, this Court held that the putative father could not establish paternity without the Court making a determination in a prior action that the presumptive legal father was not the father. *Girard* at p. 243. Thus, Girard had no standing to bring a claim under the Paternity Act. *Id.* at p. 243. The Court similarly determined that the putative father had no standing under the Child Custody Act. *Id.* at p. 251.

The cases decided after *Girard*, *supra*, continue to hold that a determination that the child is not the issue of the marriage must be made before another man can establish a legal relationship to the child. *Speilmaker v Lee*, 205 Mich App 51; 517 NW2d 558 (1994). As the

Court of Appeals held in *Hauser v Reilly*, 212 Mich App 184, 187; 536 NW2d 865 (1995) *app den* 451 Mich 875; 549 NW2d 566 (1996), “[a] decision of the Supreme Court is binding upon this Court until the Supreme Court overrules itself,” citing *People v Mitchell*, 428 Mich 364, 369-370; 408 NW2d 798 (1987).

The issue was most recently addressed by the Michigan Court of Appeals in *McHone v Sosnowski*, 239 Mich App 674; 609 NW2d 844 (2000). In *McHone*, a putative biological father brought a paternity action seeking an order of filiation recognizing his paternity of a child who was conceived and born to Carol Sosnowski while she was married to David Sosnowski. McHone’s complaint was not preceded by a determination in the circuit court that the child was not the issue of the defendants’ marriage. McHone argued that he had an established relationship with his son. McHone argued that the biological mother had committed a fraud on the court in failing to disclose that he was the father of the child when she obtained the divorce, and that he should be permitted to establish paternity by virtue of his established relationship with the child. *Id.*, pp. 675-676. The trial court concluded that McHone lacked standing to pursue the complaint because he had not satisfied the stringent requirements of the Paternity Act, MCL 722.711 *et seq.*, to establish standing. Thus, the trial court granted defendants’ motion for summary disposition.

McHone appealed to the Court of Appeals. The Court of Appeals at p. 678 affirmed the trial court’s order relying on the Supreme Court case of *Girard v Wagenmaker*, *supra*:

The Supreme Court has interpreted this language to mean that there must be a prior circuit court “determination that the child was not the issue of the marriage at the time of filing the complaint.” *Girard v Wagenmaker*, 437 Mich 231, 242-243; 470 NW2d 372 (1991)(emphasis in original). Where a putative father “cannot meet the requirements under either the first or second clause in the definition of a child born out of wedlock...he cannot file a proper complaint and has no standing to bring a claim under the Paternity Act.” *Id.* at 243. This Court has consistently applied the Supreme Court’s interpretation of the standing requirement under the Paternity Act. See *Opland v Kiesgan*, 234 Mich App 352,

356; 594 NW2d 505 (1999); *Hauser v Reilly*, 212 Mich App 184, 190-191; 536 NW2d 865 (1995); *Speilmaker v Lee*, 205 Mich App 51, 59-60; 517 NW2d 558 (1994).

(Emphasis in original.)

This same issue was again addressed by the Court of Appeals in the context of a child protective proceeding in the case of *In the Matter of SG, TG, DG and QR, Minors*, unpublished opinion per curiam of the Court of Appeals decided March 6, 2001 (Docket No. 227520). (App 55a-59a.) Although the opinion is not published, the appellate panel relied on *Girard, supra*, and prior published opinions of the Court of Appeals in reaching its conclusion. Therefore, the unpublished opinion lends guidance in this matter.

In *In the Matter of SG, TG, DG and QR, supra*, the biological mother had four minor children. All four children had different fathers. The mother and legal father acknowledged that Charles Riggs was a biological father to one of the children. The circuit court permitted Riggs to participate in the child protective proceedings. After a three-day termination hearing, the family court terminated parental rights of the biological mother, legal father, and the “putative father.” The biological mother and putative father appealed to the Court of Appeals.

The Court of Appeals *sua sponte* raised the question of whether the putative biological father had standing to appeal the circuit court’s decision. The Court vacated the circuit court’s decision allowing the putative father to assert any legal rights to any of the children. The Court found that absent a prior adjudication by a court of competent jurisdiction that the minor was “a child born or conceived during a marriage but not a product of that marriage for purposes of the Paternity Act,” the purported biological father lacked the requisite standing to establish paternity. The Court relied on *Girard, supra*, *McHone, supra*, the Paternity Act, and the language of the Michigan Court Rules in reaching its determination that the putative biological father lacked standing to participate in the child protective proceeding.

Applying the applicable law to the facts of this case, it is clear that Heier lacked standing to assert a claim of paternity under the Paternity Act, *supra*. Likewise, Heier lacked standing under the Juvenile Code, MCL 712A.1 *et seq.*, to intervene to establish paternity in a case where a legal father existed and the child protective proceedings were concluded.

MCR 5.903(A)(4)(a) defines the term “father” as “a man married to the mother at any time from a minor’s conception to the minor’s birth unless the minor is determined to be a child born out of wedlock.” In pertinent part, MCR 5.903(A)(1) defines “child born out of wedlock” as a “a child determined by judicial notice or otherwise to have been conceived or born during a marriage but who is not the issue of that marriage.” The term “child born out of wedlock” is a term defined in pertinent part in the Paternity Act, MCL 722.711(a) as “a child that the court has determined to be a child born or conceived during a marriage but not the issue of that marriage.” Statutes and court rules must be read in such a way as to harmonize the outcome. *People v Knox*, 115 Mich App 508; 321 NW2d 713 (1982).¹²

The record in this appeal is unequivocal that Weber and Rivard were married at the time of conception and birth of C.A.W. It is also unequivocal that C.A.W. was never determined to be a child born out of wedlock by judicial notice or otherwise. The circuit court identified Rivard as the legal and/or natural father of C.A.W. during the two and one half years C.A.W. was a temporary court ward. Rivard testified that he was C.A.W.'s father. Weber testified that Heier was not the biological father of C.A.W. Heier filed a motion to intervene in an attempt to establish paternity to C.A.W. only after the circuit court terminated Rivard and Weber's parental

¹² See also, MCR 5.921(D)(4) which indicates that a court only has the discretion to inquire about a putative father for purposes of notice if it has determined that there is no father as defined in MCR 5.903(A)(4)(a). The Court of Appeals cites this court rule as legal authority for Heier's right to establish paternity to C.A.W., but misinterprets the court rule. See FIA's Brief on Appeal, *infra*, pp. 23-32.

rights. Heier attempted to establish paternity of C.A.W. in the **context** of a child protective proceeding, which had already concluded. This Court's ruling in *Girard* and its progeny, make clear that absent a prior adjudication by a court of competent jurisdiction that C.A.W. was a “[c]hild...born or conceived during a marriage but not the issue of the marriage,” for purposes of the Paternity Act, Heier, as a purported biological father, lacks standing to establish paternity.

- 1. Neither the Juvenile Code, MCL 712A.1 *et seq*, nor the Michigan Court Rules pertaining to child protective proceedings allow a putative biological father to intervene in a child protective proceeding where there is already a legal father.**

In Michigan, the law is clear as to who has standing to establish paternity. Standing to pursue relief under the Paternity Act is conferred on (1) the mother of a child born out of wedlock, (2) the father of a child born out of wedlock, or (3) the Family Independence Agency on behalf of a child born out of wedlock who is being supported in whole or in part by public assistance. MCL 722.714(1). Under the Paternity Act, a child is considered to be born out of wedlock if the mother was not married from the time of the child’s conception to its birth, or if the child is one that “the court has determined to be a child born or conceived during a marriage, but not the issue of that marriage.” MCL 722.711(a).

The majority opinion below acknowledged that “[t]he language of this statute has been determined by the Supreme Court to mean that there must be a prior circuit court ‘determination that the child was not the issue of the marriage at the time of filing the complaint.’” *Girard, supra*. (App 46a.) The majority opinion and dissent both agreed that Heier cannot establish paternity under the Paternity Act considering this Court’s ruling in *Girard, supra*. (App 46a-53a.)

However, in its attempt to grant relief to Heier, notwithstanding *Girard*, the Court of Appeals determined that the Juvenile Code and its court rules allow Heier to establish paternity in the context of a child protective proceeding. The Court's opinion states that "[w]hile Michigan's Paternity Act permits a father to establish paternity if there has been a prior determination that child was born out of wedlock, the juvenile code, and the case law interpreting it, is less instructive." (App 46a.) The Court of Appeals opinion is contrary to established Michigan jurisprudence on this issue. In other words, the Court of Appeals cannot permit Heier to do indirectly under the court rules that which he is directly prohibited from doing under the Paternity Act and this Court's decisions interpreting the Paternity Act.

The Juvenile Code, MCL 712A.1 *et seq.*, defines the scope and jurisdiction of the family division of the circuit court in child protective proceedings but does **not** address paternity issues. The court rules governing cases in child protective proceedings are found at MCR 5.901 *et seq.* These court rules, "govern practice and procedure in the family division of the circuit court in all cases filed under the Juvenile Code,"¹³ and cannot be interpreted or relied upon, as the majority opinion does in the case at bar, to confer substantive rights on a person claiming to be a biological father.

What Heier asserts is the **right** to have himself declared the natural father of C.A.W. and thereby obtain a vehicle to establish paternity where he is foreclosed from doing so under the Paternity Act. This is a matter of substantive law, not a procedural matter. *Michael H. v Gerald D.*, 491 US 110; 109 S Ct 2333; 105 L Ed 2d 91 (1989) . The Legislature has enacted the Paternity Act, *supra*, and most recently the Acknowledgement of Parentage Act, MCL

¹³ MCR 5.903(A)(7) states "Juvenile Code means 1944 (1st Ex Sess) PA 54, MCL 712A.1; MSA 27.3178 (598.1) *et seq.* as amended."

722.1002¹⁴ as the statutory vehicles for establishing one's paternity of a child **born out of wedlock**. The majority opinion failed to recognize that Heier's case is simply a paternity action set and pursued in the context of a child protective proceeding. **The setting should not be used to expand substantive law governing paternity as the Court of Appeals has done.**

As noted above, although the majority refers to the "juvenile code," it is not relying on the Code, but instead the court rules governing practice and procedure in the circuit court involving cases filed under the Juvenile Code. It is well settled that court rules take precedence over statutes **only** in matters involving judicial rules or practice and procedure, not substantive law. *Smith v Smith*, 433 Mich 606, 619-620; 447 NW2d 715 (1989); see also, *Kirby v Larson*, 400 Mich 585, 597-598; 256 NW2d 400 (1977). This Court's rulemaking authority extends only to matters of practice and procedure and this "Court is not authorized to enact court rules that establish, abrogate, or modify the substantive law." *People v Glass*, 464 Mich 266, 281; 627 NW2d 261 (2001); see also, *McDougall v Schanz*, 461 Mich 15, 22; 597 NW2d 148 (1999) (if a

¹⁴ Pursuant to the Acknowledgement of Parentage Act, *supra*, a man is deemed the natural father of a child born out of wedlock if that man "joins with the mother of the child and acknowledges that child as his child by completing a form that is an acknowledgement of parentage." MCL 722.1003. As with the Paternity Act, *supra*, this Act is only applicable to a "child born out of wedlock." Thus, a person cannot file an action under the Paternity Act, *supra*, or obtain an acknowledgement of paternity unless the child is born out of wedlock. The Acknowledgement of Parentage Act defines a "child born out of wedlock" as "a child conceived and born to a woman who was not married at the time of conception or the date of birth of the child, or a child that the circuit court determines was born or conceived during a marriage but is not the issue of that marriage." MCL 722.1002(b). Additionally, acknowledgement of paternity under MCL 722.1003 does not afford the father the same legal rights as a father whose child is born within a marriage, but rather, merely entitles the parties to seek custody, support, or parenting time without the need to first obtain an order of filiation under the Paternity Act, *supra*. *Eldred v Ziny*, 246 Mich App 142, 148-149; 631 NW2d 748 (2001). Although MCL 722.1004 affords the child the full rights of a child born in wedlock, the statute does not grant a putative father who acknowledges paternity the same legal rights as a father whose child is born in wedlock. See, e.g., *Crego v Coleman*, 463 Mich 248, 264; 615 NW2d 218 (2000).

particular court rule contravenes a legislatively declared principle of public policy, having as its basis something other than court administration, the court rule should yield.)

This Court in *Smith v Smith*, *supra*, addressed a similar issue. In *Smith*, the Court found that insofar as a court rule may interfere with any legislative act governing substantive law, the court rule is without legal effect. In the *Smith* case, Mary Smith sought an increase in child support payments, and an extension of support beyond the age of majority due to her child's permanent physical and mental deficiencies resulting from birth defects. The circuit court denied the request because it lacked legal authority to award post-majority support. The Court of Appeals remanded the case and awarded post-majority support, finding authority for its decision to remand in a Michigan court rule. This Court reversed the Court of Appeals, stating at pp. 619-620:

We acknowledge that this conclusion is contrary to MCR 3.209(B)(1)(b), originally adopted by this Court in 1972 as GCR 1963, 729.2(1). However, this Court has said that court rules may take precedence over statutory language only in matters involving judicial rules of practice and procedure. See *Perin v Peuler*, 373 Mich 531; 130 NW2d 4 (1964). The child support provision of §17a is a matter of *substantive* law and, as such, supersedes MCR 3.209(B)(1)(b).

(Emphasis in original.)

This Court went on to address this issue further, stating at p. 620:

The problem arises when we attempt to insert the court rule in place of the statutory language. The Supreme Court itself has indicated that court rules may take precedence over statutory language only in matters involving judicial rules of practice and procedure. *Perin v Peuler*, 373 Mich 531; 130 NW2d 4 (1964). This being a matter of the substantive law, the legislative enactment must control. *The trial court's reliance on GCR 1963, 729.2(1) to justify an award of support to a child who has reached the age of majority contravenes the Legislature's expressed intent in the statute enabling a circuit court to award any support at all*, as interpreted by decisions of the Supreme Court. Until such time as the Legislature sees fit to settle the inconsistency between the support statute and the Age of Majority Act, we are bound to follow its mandate. ...¹⁵

¹⁵ In 1990, after this Court's ruling in *Smith*, the Legislature amended the Age of Majority Act to allow for post-majority support for high school students up to the age of 19.

(Emphasis in original.)

Likewise, this Court's ruling in *Girard, supra*, and its interpretation of the Paternity Act, *supra*, was binding on the Court of Appeals in the instant case and required it to comport with the law governing the issue of paternity until the Legislature sees fit to change the statute. The majority decision of the Court of Appeals erred when it relied on the court rules governing child protective proceedings to grant **substantive** rights to Heier. The Court of Appeals' error is further compounded by the fact that it completely ignores the substantive language of the Paternity Act, that plainly precludes Heier from intervening and establishing paternity to C.A.W.

2. The Court of Appeals erred in concluding that C.A.W. was a "child born out of wedlock."

The majority determined that C.A.W. was a child "born out of wedlock." (App 49a.) This determination is wrong. The term, "child born out of wedlock" is a term that the Legislature has already defined in the current version of the Paternity Act, MCL 722.711(a) as:

[A] child begotten and born to a woman who was not married from the conception to the date of birth of the child, or a child that the court has determined to be a child born or conceived during a marriage but not the issue of that marriage.

Under MCR 5.903(A)(1), a "child born out of wedlock" is defined as a child "conceived and born to a woman who is unmarried from the conception to the birth of the child, or a child determined by judicial notice or otherwise to have been conceived or born during a marriage but who is not the issue of that marriage."

In order for a putative biological father to have standing to file an action under the Paternity Act, *supra*, or to meet the requirements of the Acknowledgement of Parentage Act, *supra*, a child must be a "child born out of wedlock." The clear text of the pertinent statutes and court rules requires a finding that C.A.W. was not born out of wedlock because there was no prior court determination that he was not the issue of the marriage between the presumptive legal

father (Rivard) and Weber. *Girard, supra*; *People v Stone*, 463 Mich 558, 562; 621 NW2d 702 (2001) (if the statutes language is clear and unambiguous, then we assume that the Legislature intended its plain meaning and the statute is enforced as written.) Even under MCR 5.903, C.A.W. is not a child born out of wedlock because his parents were married at the time of conception and birth, and there was never a determination that he was not the issue of the marriage by judicial notice or otherwise.¹⁶

The Court conveniently ignored this crucial fact and engaged in its own fact-finding by elevating the mother's contradictory statements regarding C.A.W.'s paternity to the level of a judicial determination. The majority opinion treats Heier and the mother's statements of paternity as falling within the phrase "otherwise determined" to find that C.A.W. is a child born out of wedlock. However, fact-finding is not within the province of the appellate court. Instead, fact-finding is a function properly performed by the trial court since the trial court has the ability to view the parties/witnesses and assess credibility. Additionally, as previously discussed, a court rule cannot be used to vest Heier with substantive rights that do not exist under the governing statutes.

Therefore, the Court of Appeals conclusion that C.A.W. was a child born out of wedlock or could have been considered a child born out of wedlock must be reversed because it is clearly erroneous and wrong as a matter of law.

¹⁶ The Court of Appeals referred to the fact that a referee, in an erroneous ruling, ordered a blood test but fails to recognize or chooses to ignore the fact that the circuit court never found that C.A.W. did not have a father. MCR 5.921(D). In fact, there had already been a prior adjudication that Rivard was the legal and/or natural father of all three children. (App 10a.) This referee was "filling in" for the regularly assigned referee who was out on a medical leave. Rivard never denied or contested paternity and subsequent orders did not require him to participate in paternity testing. This is a superfluous order, and not critical to the issues before this Court.

3. The Court of Appeals erred in concluding that the circuit court could have determined the identity of the putative biological father.

The Court of Appeals opinion erroneously concluded that MCR 5.921(D) and MCR 5.903(A)(4) allow the circuit court to determine the identity of a biological father despite the existence of a legal father. (App 48a.) Construction of a court rule is a question of law that this Court reviews *de novo* for error. *St. George Greek Orthodox Church v Laupmanis Associates, P.C.*, 204 Mich App 278, 282; 514 NW2d 516 (1994). Court rules are construed in the same manner as statutes. *Id.* If the language is clear, the court should apply it as written. *Dale v Beta-C, Inc.*, 227 Mich App 57, 65; 574 NW2d 697 (1997), *lv den* 459 Mich 877; 585 NW2d 302 (1998). Court rules take precedence over statutes only in matters involving procedure and practice, not in matters involving substantive law. *Kirby, supra*; *McDougall, supra*.

According to the plain language of the court rules relied upon by the majority, Heier does not come within the meaning of father as defined by MCR 5.903(A)(4).¹⁷ C.A.W. was conceived and born during a marriage between Rivard and Weber. Rivard is identified as both the natural father and legal father of C.A.W. MCR 5.903(A)(4)(a). Prior to the conclusion of the

¹⁷ Father is defined at MCR 5.903(A)(4) as:

(4) “Father” means:

- (a) a man married to the mother at any time from a minor’s conception to the minor’s birth unless the minor is determined to be a child born out of wedlock;
- (b) a man who legally adopts the minor;
- (c) a man who was named on a Michigan birth certificate for a minor born after July 20, 1993, as provided by MCL 333.21532; MSA 14.15(21532); or
- (d) a man whose paternity is established in one of the following ways within time limits, when applicable, set by the court pursuant to this subchapter:
 - (i) the man and the mother of the minor acknowledge that he is the minor’s father by completing and filing an acknowledgement of paternity. The man and mother shall each sign the acknowledgement of paternity in the presence of 2 witnesses, who shall also sign the acknowledgement, and in the presence of a judge, clerk of the court, or notary public appointed in this state. The acknowledgement shall be filed at either the time of birth or another time during the child’s lifetime with the probate court in the mother’s county of residence or, if the mother is not a resident of this state when the acknowledgement is executed, in the county of the child’s birth.
 - (ii) the man and the mother file a joint written request for a correction of the certificate of birth pertaining to the minor that results in issuance of a substituted certificate recording the birth;
 - (iii) the man acknowledges that he is the minor’s father by completing and filing an acknowledgement of paternity, without the mother joining in the acknowledgement if she is disqualified from signing the acknowledgement by reason of mental incapacity, death, or any other reason satisfactory to the probate judge of the county of the mother’s residence or, if the mother is not a resident of this state when the man signs the acknowledgement, of the county of the minor’s birth.
 - (iv) a man who by order of filiation or by judgment of paternity is determined judicially to be the father of the minor.

child protective proceeding, there was no prior judicial determination that C.A.W. was “born out of wedlock.”

MCR 5.921(D) identifies persons entitled to notice in child protective proceedings. The Court of Appeals incorrectly interpreted the language of MCR 5.921(D) to mean that the circuit court could have determined that Heier was the father of C.A.W. at anytime during the pendency of the proceeding. The Court of Appeals erred in making this statement because the first line of MCR 5.921(D) provides, “[i]f, at anytime during the pendency of a proceeding, **the court determines that the minor has no father as defined in MCR 5.903(A)(4)**, the court may, in its discretion, take appropriate action as described in this subrule.” (Emphasis added.) The very first line of MCR 5.921(D) requires the court to determine **that there is no father** as defined in MCR 5.903(A)(4). The court could not make this finding because C.A.W. already had a legal father -- Rivard.

If it was determined that C.A.W. did not have a father, then the circuit court could have proceeded under MCR 5.921(D) to determine if there was a putative biological father. The putative biological father would then have been entitled to proper notice once identified to be the putative father of C.A.W. If the putative biological father came forward, the court would have allowed him 14 days to establish paternity as outlined in MCR 5.903(A)(4). The procedures outlined in MCR 5.903(A)(4) mirror the language of the substantive law established by the Legislature regarding paternity. To the extent that the court rules conflict with the substantive law enacted by the Legislature, the substantive law is controlling. *Kirby, supra; McDougall, supra.*

In this case, the trial court could not have legally proceeded under MCR 5.921(D) because Rivard, who was married to the mother during the conception and birth of C.A.W., always maintained that he was C.A.W.’s natural and legal father. To have done so would have

been in derogation of the procedural protection afforded the legal father under MCR 5.921(D). The plain language of the court rule supports this interpretation when read in conjunction with this Court's decision in *Girard, supra*, and the Court of Appeals decision in *McHone, supra*.

4. The case law relied upon by the Court of Appeals to support its decision that a putative biological father has standing to intervene in a child protective proceeding is not applicable to this case.

The opinion surmised that an adoption case, *In re Kozak*, 92 Mich App 579; 285 NW2d 378 (1979), lends more guidance in this matter than this Court's decision in *Girard* (App 461-47a.) The Court's reliance on *Kozak* is misplaced.

Kozak involved a consent/release for adoption brought under the Adoption Code, MCL 710.21 *et seq.*, where the identity of the father was fraudulently concealed. The case was decided 12 years before *Girard*. Shortly after the birth of the child, the mother and her husband petitioned for termination of their parental rights and to terminate the rights of the natural father, whose identity the mother claimed was unknown to her. As distinguished from the instant case, the mother's husband **never** claimed to be the child's father although he was married to the mother. The probate court terminated the rights of the unknown father. When the biological father first learned of the proceeding, he came forward to establish paternity. He claimed that the mother and her husband had given false testimony. On these facts, the Court of Appeals set aside the adoption and remanded the case. However, the Court clearly stated that a fraud, in order to justify interference with a probate order in an adoption case, must be an active or positive fraud committed in obtaining an order and not merely a constructive fraud.

Kozak is distinguishable on several points. First, Rivard has always claimed to be the father. Furthermore, Weber has indicated that Rivard is the father. Finally, the fact that Weber has candidly admitted that she had extramarital affairs with various men simply does not establish that an active positive fraud was perpetrated on the Court.

The issue of fraud in the context of another adoption matter was addressed more recently by the Court of Appeals in *In re Neagos*, 176 Mich App 406; 439 NW2d 357 (1989). In that case, a biological mother sought to set aside the adoption of her children several years after the children were adopted. The probate court held that it had no jurisdiction and that the grounds were insufficient for a rehearing. The petitioner mother contested the adoption claiming the existence of fraud in the adoption process because 1) the respondents broke their promise to allow visitation with the children, 2) her psychological condition was unsound due to stress at the time she consented to the adoption, and 3) she was not fully informed of her legal rights at the consent hearing. After finding that the lower court properly dismissed the case for lack of jurisdiction, the Court addressed the issue of fraud in accordance with the ruling in *Kozak*. The Court then found that there was no showing of fraud that would justify equitable interference. It reasoned that to justify equitable interference with a probate order there must be fraud in obtaining the order and not merely constructive, but positive, fraud. The Court found that the mother's allegations were not allegations of positive fraud but instead constituted a collateral attack on the adoption proceedings. The Court additionally found that the allegations the respondents broke their promise to allow visitation did not amount to positive fraud in the adoption process.

The Court of Appeals' reliance on *Kozak* in the instant case is clearly misplaced. Here, the circuit court identified Rivard as the legal father by virtue of his marriage to Weber. The circuit court also heard repeated testimony that Rivard believed he was the natural father of **all** three children and Rivard was fighting to keep his rights as a father, not to relinquish his rights. Also, unlike the husband in *Kozak*, Rivard never repudiated his paternity to C.A.W.

Second, unlike the putative biological father in *Kozak*, Heier was fully aware of the child protective proceedings for two and one half years and had ample opportunity during that time to

notify the circuit court of his paternity claim. Instead, Heier chose to do nothing but let C.A.W. reside in foster care for two and one half years. Heier claims he did nothing because he wanted C.A.W. returned to Weber and she advised him she thought she would get all three children back home. In contrast to the mother in *Kozak* who voluntarily relinquished her parental rights, it is clear from this record that Deborah Weber aggressively sought to retain custody of her children.¹⁸ She clearly wanted her children back. This case is neither factually nor legally similar to *Kozak*, and the Court of Appeals' reliance on this case must be rejected. In the instant case, there was no evidence of fraud on the part Weber or Rivard that could possibly warrant reversal of the circuit court's decision and halt C.A.W.'s adoption.¹⁹

The Court of Appeals also relied on the case of *In re Montgomery*, 185 Mich App 341; 460 NW2d 610 (1990). (App 48a.) At the outset, it should be noted that *Montgomery* was also decided before this Court's decision in *Girard, supra*. Again, the Court of Appeals relies on a case that is factually and legally dissimilar to the case at bar. In *Montgomery*, a purported biological father attempted to establish paternity to a child in the context of a child protective proceeding. A legal father existed and, like the legal father in *Kozak*, the legal father stated he was not the father of the child. Additionally, the legal father was incarcerated for 15 months

¹⁸ Even though Weber made every effort to improve her parenting skills and work on other issues, such as her involvement with violent men like Heier, she was not successful. The circuit court properly terminated her rights. *Family Independence Agency v Deborah Ann Weber*, unpublished opinion per curiam of the Court of Appeals, decided October 26, 2001 (Docket No. 232206).

¹⁹ The Court of Appeals also ignored the fact that in *McHone, supra*, the putative father alleged fraud on behalf of the mother. The Court of Appeals at that time apparently did not find these allegations persuasive because it found that "[t]he barrier provided by the Supreme Court in *Girard, supra*, cannot be hurdled in this Court." *McHone*, at p. 680.

prior to and up to the child's birth and could not have been the child's father. Based on these facts, the trial court concluded that the child was not the issue of the marriage and allowed the purported biological father to establish paternity.

In re Montgomery is clearly distinguishable from the case at bar. Rivard not only resided in the community but was also married to Weber, C.A.W.'s mother, at the time of conception and birth. Unlike *Montgomery*, there is no impossibility that Rivard could be the father. Unlike *Montgomery*, Rivard and Deborah Weber testified that Rivard is the father of C.A.W. Given these facts, the circuit court could not find that C.A.W. did not have a father pursuant to MCR 5.921(D) or that he was a child born out of wedlock pursuant to MCR 5.903(A)(4)(a).

5. The Court of Appeals' attempt to analogize a child protective proceeding to one under the Adoption Code, MCL 710.21 *et seq.*, and confer standing on a putative biological father in a child protective proceeding where there is already a legal father is wrong as a matter of law.

It was clearly wrong for the majority opinion to liken this instant case to one under the Adoption Code, MCL 710.21 *et seq.* The Court of Appeals (App 49a.) asserts that for the child to be adopted, "all parents must relinquish their legal rights to the child by either consenting to the adoption or by the court terminating their rights."

However, the law presumes that a child has two parents, a mother and a father. Once the mother and father's parental rights have been terminated under the Juvenile Code, there is no provision in the existing law that would allow another person to assert legal rights to the child. Also, the majority refers to one provision in the Adoption Code addressing putative fathers and states that this is the process to be followed in child protective proceedings. MCL 710.36. However, the Legislature alone has the authority to make changes conferring **substantive** rights in the context of a child protective proceeding. The judiciary has no such power. The Court of

Appeals was required to follow the existing law in this state since only the Legislature can rewrite the law. *Smith, supra*.

Even if these proceedings were analogous to an adoption proceeding, Heier's attempt to establish paternity to C.A.W. would have failed in that forum. First, the court could not have found that C.A.W. was a child born out of wedlock. Therefore, Heier would have had no recognizable rights. Additionally, his failure to come forward during the child protective proceedings is tantamount to a denial of interest in custody. For example, in *In re TMK*, 242 Mich App 302; 617 NW2d 925 (2000), a woman and her husband petitioned the circuit court for the husband's adoption of the child, TMK, who was born to the mother and another man, referred to as HR, out of wedlock. HR objected to the termination of his rights arguing that he was not notified and that the mother had a duty to notify him of TMK's birth. The trial court denied the petitions for termination of parental rights and adoption in view of the mother's failure to notify HR of TMK's birth.

The mother and her husband appealed to the Court of Appeals. The Court of Appeals reversed the trial court and held that the mother did not have a duty to notify HR of TMK's birth. The Adoption Code does not account for a situation where the father had no notice of the child's birth. The Court of Appeals also found that "a putative father, in order to object to the termination of his parental rights and to the child's adoption, must request custody; failure to do so is tantamount to a denial of interest in custody and permits the court to terminate parental rights." *Id.* at 305.

Likewise, by analogy, Heier's inaction is tantamount to a denial of interest. Heier never came forward during the child protective proceedings to seek custody of C.A.W. Heier knew the court adjudicated C.A.W. as a temporary court ward, yet made no effort to stop C.A.W.'s placement in foster care. At no time did Heier come forward and ask that he be awarded custody

prior to the conclusion of the child protective proceedings. Indeed, **Heier admits that he did not want custody of C.A.W.**, but rather wanted Weber to have custody of C.A.W. It was not until the court proceedings were **concluded** that Heier attempted to intervene, two and one half years after C.A.W. was taken into foster care. The Court of Appeals' attempt to strengthen its decision by analogizing this instant case to an adoption proceeding must fail.

6. **The Court of Appeals erred in concluding that the circuit court should have allowed Heier to establish paternity after Rivard's parental rights were terminated.**

The Court of Appeals determined that the circuit court should have allowed Heier to establish paternity after Rivard's parental rights were terminated and concluded that Rivard no longer existed as a legal father. The Court determined that once the legal father's rights were terminated, the circuit court had the ability to determine the rights of Heier as the putative father. (App 49a.) This decision is wrong as a matter of law.

First, it conflicts with the United States Supreme Court's decision in *Michael H. v Gerald D.*, 491 US 110, 118; 109 S Ct 2333; 105 L Ed 2d 91 (1989). In that case, a putative biological father attempted to establish his paternity and right to visitation. The putative father, Michael H., had a blood test that showed he was the biological father. Michael H. held himself out to be the child's father and he maintained a filial relationship with the child. However, the legal father filed a motion for summary disposition on the ground that there were no triable issues of fact as to paternity because he was married to the mother at the time of conception and birth. He also had an established relationship with the child. The United States Supreme Court found that a child could have only one father stating that, "**California law, like nature itself, makes no provision for dual fatherhood.**" (Emphasis added.) *Id.*, p. 118.

On an intellectual level, the answer is clear. **A child can only have one father.** On a legal level, the question becomes which man possesses the right to declare himself the legal

father and has the corresponding responsibility to care for the child. The answer in the instant case, as well as in *Michael H.*, is the mother's husband. Heier never overcame the presumption that Rivard was the legal father since the court never declared the child was not the issue of the marriage.

Additionally, pursuant to MCL 700.2114(1)(a) of the Probate Code, "[i]f a child is born or conceived during a marriage, both spouses are presumed to be the natural parents of the child for purposes of intestate succession." Likewise, it is presumed that Rivard is the natural father of C.A.W. and that presumption cannot be undone because his parental rights were terminated.

The Court of Appeals opinion, if carried to its logical conclusion, means that the presumption of legitimacy can be defeated at anytime that a legal father's rights are terminated. In other words, what a putative biological father could not do in a paternity action could be done within the context of a child protective proceeding even after the parental rights of the legal father are terminated. Thereafter, the putative father could file a subsequent action to intervene and seek custody of the child. If this were allowed, there would be **no** finality to any child protective proceeding.

Also, the Court of Appeals has vested Heier with substantive rights that he did not have during the child protective proceedings. If Heier did not have these substantive rights prior to the termination, the judicial act of terminating Rivard's rights does not vest Heier with substantive rights. The Court acknowledged that this new legal theory is not supported by the Juvenile Code or court rules. However, the effect of its decision is to create new rights to apply to those involved in child protective proceedings. As this Court stated in *Van v Zahorik*, 460 Mich 320, 330; 597 NW2d 15 (1999), "the judiciary is not the proper entity to create new rights or extend theories to reach new situations." This is the province of the Legislature, not the judiciary. *Id.* In this case, the Court's attempt to allow Heier standing under a new legal theory

must fail. Such a change in the jurisprudence would not be prudent public policy nor should it become public policy without legislative consideration.

7. The Court of Appeals erred in concluding that Heier was entitled to notice.

The Court of Appeals determined that because Heier was named as a possible biological father of C.A.W. in the initial petition, he was entitled to notice of the proceedings. (App 50a.) In Michigan, the law is well established that Heier was not entitled to notice of the proceedings because he is not a person entitled to notice. See, *In re NEGP*, 245 Mich App 126, 134; 626 NW2d 921 (2001). The Court of Appeals rationalizes its position by stating that Heier was entitled to notice because he was mentioned initially as a purported biological father but ignores the fact that the initial petition identified **Rivard as the legal father of all three children**. Therefore, Heier did not have any rights. (App 7a.) Michigan court rules establish that Heier cannot invoke the notice requirement in child protective proceedings because the legal father, Rivard, is the only respondent and father entitled to notice. MCR 5.901 *et seq*.

The Court also found that because the circuit court notified Heier of the proceedings initially through publication, pursuant to MCR 5.921(B)(1), Heier was “any other person the court may direct to be notified” and he was entitled to reasonable notice. However, Heier did not have standing to participate in the circuit court proceeding. Therefore, the fact that the court directed he be notified is irrelevant. As correctly stated in the dissent, Heier simply could not have participated in the child protective proceedings without having the legal standing to do so. (App 55a.) Finally, the Court ignored the fact that Heier did in fact know about the child protective proceedings for two and one half years, but he chose not to get involved purportedly because he wanted all three children returned to Weber.

8. The standing requirement enunciated by this Court does not deprive Heier of a recognized liberty interest without due process of law.

Heier argued to the Court of Appeals that the Paternity Act's standing requirements deprived him of a recognized liberty interest without due process of law. In support of that argument, Heier relied on *Hauser v Reilly*, 212 Mich App 184; 536 NW2d 865 (1995), where the plaintiff argued that the Paternity Act, by precluding him from obtaining standing, deprived him of his right of due process. *Id.* at 187. Constitutional issues are reviewed *de novo*. *People v Pitts*, 222 Mich App 260, 263; 564 NW2d 93 (1997).

After noting that the record is unclear whether Heier is the biological father of C.A.W., the dissent addressed the due process claim (App 54a-55a):

The record does not establish that appellant [Heier] had a substantial relationship with the minor child as a parent. ...[A] substantial parent-child relationship [is defined] as, "[w]hen an unwed father demonstrates a full commitment to the responsibilities of parenthood by 'com[ing] forward to participate in the rearing of his child.'" *Michael H.*, *supra* at 143 quoting *Lehr v Robertson*, 463 US 248, 261; 103 S Ct 2985; 77 L Ed 2d 614 (1983), and *Caban v Mohammed*, 441 US 380, 392; 99 S Ct 1760; 60 L Ed 2d 297 (1979). There is no record [to] support that appellant [Heier] had a relationship with the minor child that could be defined as substantial or to the point that appellant was actively fulfilling his role as a parent. ...

The majority decided it did not need to rule on the due process claim because it found Heier had standing to intervene. The FIA, however, agrees with the dissent that the record simply does not support a finding that there was a certain biological link or a substantial child-parent relationship.

9. Michigan law governing intervention mandates that Heier's motion to intervene be denied.

In its December 26, 2002 order granting leave, this Court limited the issued on appeal to "whether a putative biological father has standing to intervene in a Juvenile Code child protective proceeding where the subject child already has a legal father." (App 56a.) As to the

law pertaining to intervention, the FIA correctly pointed out in its previous pleadings that Heier's motion lacked citation to any authority that would allow him to intervene in a child protective proceeding. The Macomb County Prosecutor's office correctly pointed out to the circuit court that the motion should be denied, giving laches as the reason for denial of the motion.

In common law, there was no right to intervene in child protective proceedings. Neither the Juvenile Code nor its court rules address the issue of intervention as it pertains to this case. Heier was not a person entitled to participate in the proceeding and there is no statutory provision or court rule that would allow his intervention in a child protective proceeding. See, *In re Foster, supra* (grandmother did not have standing to intervene and participate in a child protective proceeding); c.f., *In re Johanson*, 156 Mich App 608, 611-612; 402 NW2d 13 (1986)(the Indian Child Welfare Act, 25 USC 1912 clearly states that an Indian tribe be advised the tribe can intervene in a child protective proceeding involving a child of Indian heritage.) No similar statutory provision exists for Heier to intervene.

Moreover, a right to intervene must be asserted within a reasonable time as laches or an unreasonable delay are proper reasons to deny intervention. *Karrip v Township of Cannon*, 115 Mich App 726, 731; 321 NW2d 690 (1982). In this case, C.A.W. was in foster care for over two and one half years before Heier decided to intervene in the proceedings. Under the law governing intervention, this is an unreasonable delay and would have been, alone, a proper reason for the court to deny intervention.

E. Public policy does not allow the judiciary to confer standing on a putative biological father to intervene in a Juvenile Code child protective proceeding where the subject child already has a legal father.

1. Standard of Review

As a general rule, making social policy is the realm of the Legislature, not the courts. *Van v Zahorik*, 460 Mich 320, 327; 597 NW2d 15 (1999); see also, *In re Kurzyniec*, 207 Mich App 531, 543; 526 NW2d 191 (1994). “This is especially true when the determination or resolution requires placing a premium on one societal interest at the expense of another: ‘The responsibility for drawing lines in a society as complex as ours—of identifying priorities, weighing the relevant considerations and choosing between competing alternatives—is the Legislature’s, not the judiciary’s.’” *Van, supra*, citing *O’Donnell v State Farm Mut Automobile Ins Co*, 404 Mich 524, 542; 273 NW2d 829 (1979).

2. The Court of Appeals opinion violates the fundamental principle of the presumption of legitimacy and the sanctity of family.

The presumption of legitimacy is a fundamental principle of law. *Michael H., supra* at 124. The public policy behind this presumption is an aversion to declaring children illegitimate. *Id.* at 125. Additionally, the institution of family is deeply rooted in this nation’s history and tradition. In *Michael H.* at 124, the Supreme Court stated, “[o]ur traditions have protected the marital family (Gerald, Carole, and the child they acknowledge to be theirs) against the sort of claim Michael asserts.” The policy concern behind this rationale is the interest in promoting the “peace and tranquility of States and families.” *Id.* at 125.

Michigan’s public policy favors marriage. *McCready v Hoffius*, 459 Mich 131, 140; 586 NW2d 723 (1998), vacated in part on other grounds 459 Mich 1235 (1999). This important public policy was recognized by this Court in *Van, supra*. In *Van*, Van and Zahorik cohabited, but were never married. Zahorik had two children, but Van was not the legal or biological father

of the children. However, Van considered himself to be the father, and the children viewed him as a parent. Van and Zahorik's relationship ended and Van asked this Court to extend the equitable parent doctrine outside the context of marriage so that he could maintain a relationship with the children. In considering Van's claim, this Court recognized that public policy favors marriage, stating at p. 332, footnote 4:

Indeed this public policy is deeply entrenched in our law. As early as 1901, and in an unbroken series of cases, it has been held to be the policy of this state. See, e.g., *Wagoner v Wagoner*, 128 Mich 635; 87 NW 898 (1901); *May v Meade*, 236 Mich 109; 210 NW 305 (1926). Moreover, there can be no other understanding of the Legislature's action in abolishing common-law marriage in 1957. MCL 551.2; MSA 25.2.

This Court continued with its analysis at pp. 332-333:

In *Carnes v Sheldon*, 109 Mich App 204, 216; 311 NW2d 747 (1981), the Court of Appeals quoted the Illinois Supreme Court opinion in *Hewitt v Hewitt*, 77 Ill 2d 49, 58; 394 NE2d 1204 (1979), which thoughtfully addressed the propriety of the judiciary weighing the equities in claims between cohabitants:

"There are major public policy questions involved in determining whether, under what circumstances, and to what extent it is desirable to accord some type of legal status to claims arising from such relationships. Of substantially greater importance than the rights of the immediate parties is the impact of such recognition upon our society and the institution of marriage. Will the fact that legal rights closely resembling those arising from conventional marriages can be acquired by those who deliberately choose to enter into what have heretofore been commonly referred to as 'illicit' or 'meretricious' relationships encourage formation of such relationships and weaken marriage as the foundation of our family-based society? In the event of death shall the survivor have the status of a surviving spouse for purposes of inheritance, wrongful death actions, workmen's compensation, etc? And still more importantly: what of the children born of such relationships? What are their support and inheritance rights and by what standards are custody questions resolved? What of the sociological and psychological effects upon them of that type of environment? Does not the recognition of legally enforceable property and custody rights emanating from nonmarital cohabitation in practical effect equate with the legalization of common law marriage...?"

Here the Court of Appeals correctly observed that a relationship that does not constitute a legal marriage does not give rise to property rights between the parties, and, similarly, that a court should not be unmindful of the role of our Legislature concerning access to children on the periphery of such relationships....

We hold that because the requested extension of the equitable parent doctrine would affect the state's public policy in favor of marriage, the Legislature is clearly the proper entity to consider this issue.

In *Van*, the underlying facts are different but the legal principles and public policy considerations are the same. The Court of Appeals has ignored important public policy concerns in an effort to give Heier rights that he is not entitled to under the existing law of this state. The opinion bastardizes a child who was conceived and born during a marriage and treated as a part of a family unit. The opinion expresses great sympathy for Heier, but sympathy is no excuse to ignore strong public policy concerns and this Court's precedent.

3. The Court of Appeals opinion nullifies the equitable parent doctrine.

In *Atkinson v Atkinson*, 160 Mich App 601; 408 NW2d 516 (1987), *lv den* 429 Mich 883; 429 Mich 884 (1987), a husband involved in a divorce action, who was not a biological parent, wanted to be treated as a parent by the court due to the close father-son relationship the two shared, in deciding custody and visitation. The Court of Appeals adopted the doctrine of equitable parent finding that a husband may be considered an equitable parent in the absence of a biological relationship. In that case, the Court of Appeals held:

Therefore, we adopt the doctrine of equitable parent and find that a husband who is not the biological father of a child born or conceived during the marriage may be considered the natural father of that child where (1) the husband and the child mutually acknowledge a relationship as father and child, or the mother of the child has cooperated in the development of such a relationship over a period of time prior to the filing of the complaint for divorce, (2) the husband desires to have the rights afforded to a parent, and (3) the husband is willing to take on the responsibility of paying child support. We hold that the husband may be considered the equitable parent under these circumstances and remand this case in order to allow the circuit court to reevaluate custody and visitation, treating Plaintiff as a natural parent of Baird. [*Id.* at 608.]

The foregoing equitable parent doctrine was addressed by this Court in *Van, supra*. In *Van*, Van and Zahorik were never married. The custody dispute was not in the context of a divorce, and the children at issue were not born or conceived during a marriage. Van was not the biological or legal father of the children. Van sought custody of the children because he lived with the children and invoked the equitable parent doctrine. The *Van* Court noted that the equitable parent doctrine applies, upon divorce, with respect to children born or conceived during the marriage. This Court declined to extend the equitable parent doctrine outside of the context of a marriage. This Court noted that the “strongest rationales undergirding the equitable parenthood doctrine within marriage relate to the reinforcement of the importance of marriage and legitimacy.” *Id.*, p. 333. This Court additionally opined that “[i]n the context of a subject matter fraught with public policy implications and the Legislature’s occupation of the field of child custody with the promulgation of the Child Custody Act, the judiciary is not the proper entity to create new rights or extend theories to reach new situations.” *Id.*, p. 330.

The opinion below, in effect, nullifies the equitable parent doctrine recognized by the appellate courts. The Court states that biology alone is more important than any meaningful relationships established in a family unit in the context of a marriage. Since a putative biological father does not have standing to establish paternity under the Paternity Act, where the child is conceived and born during a marriage, the opinion, in effect, would encourage such people to initiate child protective proceedings in order to have standing to establish paternity. The Legislature could not have intended such proceedings to occur under the Juvenile Code.

Additionally, although addressing a due process claim, the Michigan appellate courts have expressed what interest the courts are seeking to protect through its prior holdings:

The protected interest, however, is in the family life, not in the mere biological link between parent and child. A rapist has a biological link with a child conceived by that rape. If we held that a mere biological link would ensure

a father of a liberty interest in the rights to a relationship with the child, the rapist would be entitled to due process protections.

Hauser v Reilly, supra at 189, citing *Michael H. v Gerald D., supra* at 124 (emphasis added).

The Court of Appeals decision, in effect, would presumably even allow a rapist or any other person to disrupt the family unit if he decides he wants to assert parental rights. This Court should reverse the Court of Appeals decision.

4. **The Court of Appeals opinion ignores the state and federal policy concerns regarding placement of children in safe and permanent homes.**

The Adoption and Safe Families Act of 1997, Pub L 105-89; 111 Stat 2115 *et seq.* (hereafter ASFA), established that children are entitled to a safe and permanent home as quickly as possible. To that end, ASFA implemented standards that the states and courts must adhere to in their activities in child welfare cases.

ASFA included such key components as: Safety of the child must be considered first and foremost; that termination of parental rights petitions must be filed if the child has been in foster care for 15 of the past 22 months; and that courts must have compelling reasons that the filing of such a petition is not in the child's best interest. Other activities around the achievement of permanency for the child must occur concurrent with the filing of the petition such as placement in an adoptive home.

In 1997, Michigan Lieutenant Governor Connie Binsfeld chaired a commission assessing child welfare in the Michigan. Concurrently with ASFA requirements, a series of laws, generally known as the "Binsfeld Legislation," were enacted in Michigan requiring FIA and the courts to focus first and foremost on permanency and stability for children.

Many of the mandated activities contained in the Binsfeld legislation mirrored ASFA. Many of them were more stringent. The commonality in each was that the child--his or her well

being and entitlement to a safe, permanent home expeditiously--was identified as being of the utmost importance.

States are currently held to strict standards by the federal government in their pursuit of these goals. The federal department of Child and Family Services reviews and monitors children's movement toward permanency and mandates that children have permanency and stability in their living situations.

At both the federal and the state level, the recognition that a child is entitled to grow up free from the threat of harm, in a safe home with a sense of stability, permanency and community are the themes that all child welfare and family preservation services focus on. In this case, the Court of Appeals has denied C.A.W. the permanency protections of ASFA and his adoption is further delayed. Such a delay is clearly neither in C.A.W.'s best interest, nor the best interests of children involved in child protective proceedings in Michigan. The opinion will lead to more protracted hearings causing further instability and uncertainty in an already onerous process.

CONCLUSION AND RELIEF

The Court of Appeals opinion is correct when it states that its resolution of the standing issue of a putative father in a child protective proceeding will have a great effect on the family courts in this state. (App 46a.) However, in reaching its decision, the Court erroneously relied on court rules and the Juvenile Code in vesting Heier, a putative father, with substantive rights that he could not acquire under the substantive law governing paternity. The Court of Appeals decision conflicts with this Court's ruling in *Girard, supra*. The Court of Appeals unlawfully engaged in legislating by vesting a putative biological father with substantive rights. As a matter

of public policy, any change in the substantive law of paternity should and can only be accomplished by the Legislature.

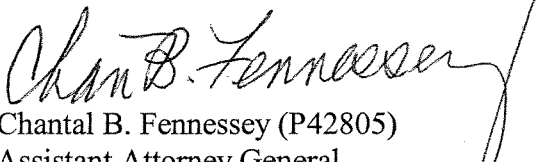
Unless reversed, the Court of Appeals decision will adversely affect well-established law pertaining to paternity, and cause material injustice to the institutions of marriage and family. The public interest in securing prompt and permanent placement of vulnerable children like C.A.W. in adoptive homes will also be frustrated.

It is therefore necessary that this Honorable Court reverse the November 1, 2002 Court of Appeals' decision and affirm the circuit court's April 26, 2001 order denying Heier's motion to intervene for lack of standing.

Respectfully submitted,

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